

No. 15117

United States
Court of Appeals
for the Ninth Circuit

NEW AND USED AUTO SALES, INC., a Corporation,
Appellant,
vs.

BERNARD L. HANSEN, also known as BARNEY HANSEN, and SUZANNE HANSEN,
Appellees.

Transcript of Record

Appeal from the District Court for the District of Alaska,
Third Division

FILED

OCT - 2 1956

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

BELL, SANDERS & TALLMAN,

Central Building,
Anchorage, Alaska,

Attorneys for Appellant

BURTON C. BISS,

220 Central Building,
Anchorage, Alaska

Attorney for Appellees

In the District Court for the District of Alaska,
Third Division

No. A-11,693

NEW & USED AUTO SALES, INC.,

A Corporation,

Plaintiff,

vs.

BERNARD L. HANSEN, a/k/a BARNEY HANSEN,
and SUZANNE HANSEN,

Defendants.

COMPLAINT

The plaintiff complains of the defendants and for cause of action alleges:

I.

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the Territory of Alaska, with its principal place of business at Anchorage, Alaska, and that it has paid its annual corporation tax last due and has filed its annual report for the last calendar or fiscal year for which such report became due for filing.

II.

That on the 31st day of December, 1954, the defendants made and entered into a Conditional Sale Contract with the plaintiffs for the purchase of one (1) 1955 Pontiac automobile bearing motor no. K755H82118, and serial no. K755H82118; a copy of said Conditional Sale Contract is attached hereto, marked Exhibit "A," and made a part hereof as fully as if set forth herein in full.

III.

That by the terms of said Contract the title to the aforementioned vehicle shall remain in the plaintiffs until after the full and complete payment of the purchase price as stated in said Contract, and that in the event default shall be made in the payment of any installments upon the purchase price the vendor, the plaintiff herein, is entitled to the possession of said vehicle.

IV.

That the defendants have defaulted in the payment of an installment due on the 3rd day of December, 1955, in the amount of One Hundred Twenty Dollars and Eighty-four Cents (\$120.84).

V.

That plaintiff has a special ownership in the above described automobile, and is entitled to the immediate possession of the same; that said automobile is wrongfully detained from plaintiff by said defendants.

VI.

That plaintiff has been damaged in the amount of Fifty Dollars (\$50.00) for the cost of recovering said personal property from defendants.

Wherefore, plaintiff prays for judgment against defendants for the recovery and possession of said automobile, or, in case possession thereof cannot be had, for a judgment against defendants for the value thereof, for damages in the sum of Fifty Dol-

lars (\$50.00), for a reasonable attorney's fee and for the costs herein expended.

BELL, SANDERS & TALLMAN
/s/ By: JAMES K. TALLMAN
Of Attorneys for Plaintiff

Duly Verified.

[Endorsed]: Filed Dec. 9, 1955.

[Title of District Court and Cause.]

**NOTICE OF MOTION FOR SUMMARY
JUDGMENT**

Please Take Notice that Burton C. Biss, attorney for defendant, will bring the attached Motion for Summary Judgment on for hearing before the above entitled Court at the Federal Building at Anchorage, Alaska, at the hour of 11:00 A.M. on the 23rd day of December, 1955, or as soon thereafter as Counsel can be heard.

Dated at Anchorage, Alaska, this 20th day of December, 1955.

/s/ BURTON C. BISS
Attorney for Defendant

Acknowledgment of Service Attached.

[Endorsed]: Filed December 20, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, by his attorney of record, and moves the Court to enter Judgment for the defendant against the plaintiff in the amount of Six Hundred Seven and 35/100 Dollars (\$607.35), plus interest and attorney's fees, and Order the automobile returned to the defendant.

This Motion is based on all the files and records herein, and particularly upon the affidavits filed with this Motion.

Dated at Anchorage, Alaska, this 20th day of December, 1955.

/s/ BURTON C. BISS
Attorney for Defendant

Acknowledgment of Service Attached.

[Endorsed]: Filed December 20, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Bernard L. Hansen, being first duly sworn, on oath, deposes and says:

That I am the same Bernard L. Hansen named as a defendant in the above entitled action.

I entered into a contract for the purchase of a 1955 Pontiac automobile with the plaintiffs and had paid Two Thousand Four Hundred Twenty Nine and 40/100 Dollars (\$2,429.40) as of the 2nd day of December, 1955, more than one-half of the total purchase price of the automobile.

I have been recently unemployed and one of my children was, and is, in need of expensive medical treatment including a surgical operation.

Saturday, the 3rd day of December, 1955, I did not have sufficient cash to make the payment on the automobile I was purchasing from the plaintiff. However, being re-employed, I was awaiting my pay check in order to meet this and other obligations.

The plaintiff re-possessed my car without first giving me any warning, on the evening of December 14th, 1955. I went to the bank to attempt to make the delinquent payment, but was there informed that plaintiff had instructed the bank not to accept any further payments.

I had already paid Two Thousand Four Hundred Twenty Nine and 40/100 Dollars (\$2,429.40) on the automobile, and could not afford to lose the investment. I also needed the car to secure work and support my family.

I contacted my attorney who advised me to secure a statement from the plaintiff of the amount due and the expenses incurred in the repossession, so that I could make the payment to the plaintiff and recover the automobile.

I wrote a request as follows: "December 16, 1955 New and Used Auto, I want a written statement of

the amount you say is due under the contract and what you claim as your expenses for retaking the car and keeping and storing it. /s/ Barney Hansen".

On or about 2:55 P.M. on the 16th day of December, 1955, I personally delivered to Art Kifer, an employee and salesman of New and Used Auto Sales, Inc., in charge of their office at 4th and A, Anchorage, Alaska, the above quoted request. Mr. Kifer apparently called Mr. Bollen, who signed the complaint, on the telephone and was informed that Mr. Bollen would return to the office in a few minutes. I waited approximately twenty minutes to speak to Mr. Bollen but he did not appear. I left the copy of my request at plaintiff's office and left.

I returned to the plaintiff's office again about 4:30 P.M. the same day and found Hallie F. Bollen there. Mr. Bollen was seated at his desk in the front office of the New and Used Auto Sales, Inc., at 4th and A. Streets. I had made an extra copy of my request and I presented it to him and waited while he read it. He refused to make a written acknowledgment of receipt.

Mr. Bollen orally stated that the amount owing was the entire remaining balance of the total purchase price but he said that any written statement would have to be prepared by his attorney.

I asked him if I could stop by the office at 1:00 P.M. Saturday, the 17th day of December, 1955, and pick up the written statement. He said that I could do that, and I requested that if he couldn't be there himself at that time, to be sure and leave

the statement with someone so I could pick it up.

I stopped by plaintiff's office at 1:00 P.M. on Saturday, the 17th day of December, 1955 and was told by Art Kifer that Mr. Bollen was not there and if I wanted to see him I would have to stop by later since he would be "in and out" all afternoon.

I left, and subsequently called plaintiff's office by telephone and found out that Mr. Bollen was in. I returned again to plaintiff's office at about 4:30 P.M. on Saturday the 17th day of December and Mr. Bollen showed me a statement of the amount due, a copy of which is attached to this affidavit. At his request, I signed a copy of plaintiff's statement to show that I had received it.

My attorney had told me that I would only have to pay the delinquent amount on the contract and the reasonable expenses of retaking the vehicle. I did not have One Thousand Six Hundred Ninety Three Dollars Thirty Nine Cents (\$1,693.39) in cash, so I could not pay what was requested in the plaintiff's statement. This was the first time anyone said that plaintiff had elected to declare the entire principal sum remaining unpaid to be due and payable.

I called my attorney, and he informed me that he would talk to me Monday, December 19, 1955. On Monday, my attorney advised me to tender to Mr. Bollen on behalf of myself and my wife the delinquent contract payment plus Five Dollars (\$5.00) for storage to December 19, plus Nine Dollars and Sixty Cents (\$9.60) for Marshal's fees in claim and delivery action. My attorney advised me

to tender this money to the plaintiff and instruct them to turn my car over to me. He further instructed me that if plaintiff refused to accept the money and turn the car over to me, that I should then tender to the plaintiff the delinquent payment plus all of the other expenses items listed in plaintiff's statement. My attorney advised me that if plaintiff still would not accept the money, then I should tender to plaintiff Two Hundred Fifteen Dollars (\$215.00) which would be more than the delinquent payment plus all of the expenses claimed.

Since I had more than Two Hundred Fifteen Dollars (\$215.00), and since I need the car for transportation, I attempted to locate Mr. Bollen to give him the money.

I asked Mrs. Blanche Avila to accompany me, and together we went to plaintiff's office. We were informed that Mr. Bollen was at the office of Bell, Sanders and Tallman, and we went there to make the payment.

I offered Mr. Bollen One Hundred Thirty Five Dollars and Thirty Two Cents (\$135.32), and made the tender by laying the cash on the desk in front of him. Mr. Bollen then talked to Mr. Tallman, and orally informed me that the delinquent payment and his costs of retaking, keeping and storing the car totaled Two Hundred Seven Dollars and Forty Four Cents (\$207.44). We were asked to step outside Mr. Tallman's office while he talked to Mr. Bollen, and I picked up the money and Mrs. Avila and myself waited outside Mr. Tallman's office.

After a few minutes, we were called back into

the office and were told by Mr. Tallman in Mr. Bollen's presence that the car would be returned to me if I paid Two Hundred Seven Dollars and Forty Four Cents (\$207.44), plus Two Hundred Twenty Five Dollars (\$225.00) which Mr. Bollen claims I owe him, plus Fifty Dollars (\$50.00) toward his attorney's fees. Although I need the car, I did not have Four Hundred Eighty Two Dollars and Forty Four Cents (\$482.44) in cash. Mr. Bollen said that he would return the car to me if I would pay Four Hundred Eighty Two Dollars and Forty Four Cents (\$482.44) in cash, or else I must pay the balance in full on the contract.

I then told Mr. Bollen that I would only pay the delinquent contract payment plus the actual costs of the repossession and I tendered to him Two Hundred Seven Dollars and Forty Four Cents (\$207.44). He refused to accept the cash and I thereupon left the office.

/s/ BERNARD L. HANSEN

Subscribed and Sworn to me before this 20th day of December, 1955.

[Seal] /s/ GERALDINE THOMPSON
Notary Public in and for Alaska. My Commission
Expires May 16, 1959.

[Title of District Court and Cause.]

To Bernard L. Hansen, a/k/a Barney Hansen, and
Suzanne Hansen:

Please Take Notice that in accordance with that

certain paragraph of the Conditional Sale Contract entered into on the 31st day of December, 1954, by and between you and New and Used Auto Sales, Inc., which said paragraph reads as follows:

"In the event of default in the payment of any of the said installments when due as hereinabove provided, time being of the essence hereof, the holder of this note may without notice or demand declare the entire principal sum then unpaid immediately due and payable."

The plaintiff in the above entitled action has elected to declare the entire principal sum remaining unpaid on your Conditional Sale Contract due and payable and the following is a statement of the sum due under the contract and the expense of retaking, keeping and storage:

Net payoff of principal sum as of December 19, 1955	\$1,611.79
Cost of undertaking by Continental Casualty Company	40.00
Cost of storage to December 19.....	5.00
Cost of filing suit.....	27.00
Marshal's fees in claim and delivery action	9.60
 Total	 <hr/>
Total	\$1,693.39

NEW AND USED AUTO SALES,
INC.

By /s/ HALLIE F. BOLLEN
President

Acknowledgment of Service Attached.

[Endorsed]: Filed December 20, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Blanche Avila, being first duly sworn, on oath, deposes and says:

Bernard L. Hansen, the defendant in the above entitled action, requested that I accompany him to act as a witness while he made a delinquent payment on his car to New and Used Auto Sales, Inc.

On the 19th day of December, 1955, at about 5:00 P.M., I accompanied Mr. Hansen to the law offices of Bell, Sanders and Tallman and was introduced to Mr. Tallman and Mr. Bollen.

I observed Mr. Hansen place One Hundred Thirty Five Dollars and Thirty Two Cents (\$135.32) upon the desk in front of Mr. Bollen and heard him say that he was tendering the payment on his car. Mr. Bollen did not accept the money and I heard him tell Mr. Hansen that counting all of the expenses the amount should be Two Hundred Seven Dollars and Forty Four Cents (\$207.44). No one gave Mr. Hansen a written statements of the expenses, but that is what Mr. Bollen said orally.

I was asked to leave the office with Mr. Hansen and we waited a few moments outside. Subsequently, we were called back into the office and I observed Mr. Hansen tender Two Hundred Seven Dollars and Forty Four Cents (\$207.44) to Mr. Bollen. Mr. Bollen refused to accept the money, and

stated that he would not return the car to Mr. Hansen unless Mr. Hansen paid off the remaining balance in full on the contract or else paid the expenses of the repossession plus Fifty Dollars (\$50.00) attorney's fees, plus Two Hundred Twenty Five Dollars (\$225.00).

/s/ BLANCHE AVILA

Subscribed and Sworn to before me this 20th day of December, 1955.

[Seal] GERALDINE THOMPSON,
Notary Public in and for Alaska. My commission
expires 5-16-59.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 20, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America
Territory of Alaska—ss:

Hallie F. Bollen, being first duly sworn, on oath deposes and states:

That he is the President of New and Used Auto Sales, Inc., the above named plaintiff, and is answering the affidavits of the defendants and motion for summary judgment as follows:

Affiant admits that he entered into a contract for the purchase of a 1955 Pontiac automobile with the

above named defendant, and affiant admits repossessing the said automobile after the default of a payment through the claim and delivery action herein.

Affiant states that within a reasonable time after receiving a request of a statement of the amount due under the contract and of the expenses for retaking, keeping and storing of the car, said statement was furnished to defendant above named, but that at no time did the defendants ever offer to pay the amount indicated in said statement; affiant admits that the defendant, Bernard Hansen, tendered certain payments as indicated in his affidavit of December 20, 1955, on file herein, but affiant denies that the amounts tendered were sufficient to pay the amounts required under the terms of the contract.

Affiant further states that he has had great difficulty with this particular defendant upon the conditional sale contract involved herein and that he has at the present time another suit pending against this defendant for the collection of a bad check in the amount of \$225.00, which said check was given as part of the down-payment upon the vehicle involved herein.

Affiant states that this is the third time that it has become necessary to repossess the automobile under this conditional sale contract and that in the two previous repossession, the defendant acquired the possession of the vehicle from the plaintiff through illegal means; in the first repossession, some time during the month of August, 1955, the defend-

ant gave plaintiff a bad check in the amount of \$225.00 plus some cash, which enabled defendant to pick up a previous bad check in the amount of more than \$300.00. However, the second check in the amount of \$225.00 was also bad and the plaintiff has been unable to collect on said check to date. Subsequent to the first repossession and the return of the automobile to defendants, the defendants defaulted again upon their payments under the conditional sale contract and affiant peacefully repossessed said vehicle and parked said vehicle upon the parking lot of plaintiff. But shortly after getting said vehicle parked on the property of the plaintiff and while affiant was away or not available to prevent such actions, the defendant Bernard L. Hansen sneaked into the lot of New and Used Auto Sales, Inc., and illegally took possession of the vehicle, driving same off with a set of keys which the defendant had in his possession. Following such illegal retaking of said vehicle by the defendant, affiant personally went out with two employees to repossess the vehicle again, but affiant and his employees were prevented from doing so by the defendant who was brandishing a gun. Subsequent to this transaction affiant, on advice of counsel informed him that if he could not get peaceable possession of the vehicle involved in here that it was necessary to bring a claim and delivery action, did bring said action.

Affiant further states that the \$225.00, mentioned in defendant's affidavit, is the sum due plaintiff upon the aforementioned "hot check"; that a suit

was brought in the Commissioner's Court upon said check and said action is now pending in the District Court, under docket number 11,713; that said \$225.00 was part of the down-payment upon the vehicle involved herein and that said check was given in part payment of a previous bad check upon the down-payment.

Further affiant sayeth not.

/s/ HALLIE F. BOLLEN.

Subscribed and sworn to before me, this 21st day of December, 1955.

[Seal] /s/ JAMES K. TALLMAN,
Notary Public in and for Alaska. My Commission
Expires November 26, 1958.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 21, 1955.

[Title of District Court and Cause.]

STATEMENT

To Bernard L. Hansen, a/k/a Barney Hansen, and Suzanne Hansen, and their attorney, Burton Biss:

Please take notice that the following is a statement of the amount in default under your conditional sale contract entered into on the 31st day of December, 1954, by and between you and New and Used Auto Sales, Inc., and of the costs of retaking, keeping and storage:

Delinquent installment due Dec. 3, 1955....	\$120.84
Late charge on delinquent installment.....	6.04
Cost of undertaking by Continental Casualty Co.	40.00
Cost of storage.....	5.00
Cost of filing suit.....	27.00
Marshal's fee in claim and delivery action..	15.80
<hr/>	
Total.....	\$214.68

You are further notified that upon payment of the above indicated sum, the vehicle retaken by plaintiff will be released to you pending the final determination of the case herein.

NEW AND USED AUTO SALES,
INC., Plaintiff,

/s/ By JAMES K. TALLMAN,
Attorney for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 24, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America
Territory of Alaska—ss:

Hallie F. Bollen, being first duly sworn deposes and states:

That he is the President of the above named plaintiff corporation; that he is over the age of

twenty-one (21) years of age and is competent to be a witness as to all matters herein.

That the plaintiff is the owner of the property claimed in this action described as: one (1) 1955 Pontiac Chieftain Sedan bearing motor No. K755H82118 and serial No. K755H82118 and plaintiff is lawfully entitled to the possession thereof.

That said property is wrongfully detained by the defendants.

That said defendants allegedly withholds and detains possession of said property, according to affiant's best knowledge, information, and belief, for the reason of preventing plaintiff from repossessing said automobile, and for the further reason that defendants are using said automobile for their private transportation purposes.

That the above indicated property has not been taken for a tax assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff.

That the actual value of the property is approximately Two Thousand Dollars (\$2,000.00).

/s/ HALLIE F. BOLLEN.

Subscribed and sworn to before me this 8th day of December, 1955.

[Seal] /s/ JAMES K. TALLMAN,
Notary Public in and for Alaska. My Commission
Expires November 26, 1958.

To: The United States Marshal, Third Division,
Territory of Alaska:

You are hereby required to take from the defendants, Bernard Hansen and Suzanne Hansen, the property described in the within Affidavit and deliver said property to the plaintiff.

Dated this 4th day of December, 1955.

NEW & USED AUTO SALES, INC.

/s/ By HALLIE F. BOLLEN,
Its President.

Marshal's Return Attached.

[Endorsed]: Filed January 3, 1956.

[Title of District Court and Cause.]

M. O. RENDERING ORAL DECISION

No. A-11; 693.

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time arguments having been had heretofore and on the 24th day of December, 1955 in cause No. A-11,693, entitled New and Used Auto Sales, Inc., a corporation, Plaintiff, versus Bernard L. Hansen, a/k/a Barney Hansen, and Suzanne Hansen, Defendants.

Whereupon the Court now grants motion for summary judgment and defendant entitled to one-fourth sum he has paid in and counsel are to ap-

pear at a later date for testimony as to the accuracy of the statement of plaintiff.

Entered Journal No. G43, Page No. 160, January 6, 1956.

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND PROPOSED JUDGMENT

Comes now the Plaintiff above named, by and through its attorney, James K. Tallman, of the law firm of Bell, Sanders & Tallman, and objects to the proposed Findings of Fact and Conclusions of Law and objects to the proposed Judgment offered by Defendants herein, for the reason that said instruments are not based upon the true facts herein, and that the true facts have not yet been determined; for the further reason that said instruments do not conform to the law of conditional sales contracts, in effect in the Territory of Alaska; and for the further reason that said instruments, if given effect, would deprive Plaintiff of its property without due process of law in that Plaintiff has not yet been heard on the motion for summary judgment.

This objection is based upon the pleadings, papers, records, and affidavit of James K. Tallman, on file herein.

Dated at Anchorage, Alaska, this 11th day of January, 1956.

/s/ JAMES K. TALLMAN.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 11, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America
Territory of Alaska—ss:

James K. Tallman, being first duly sworn, on oath deposes and states:

He is the attorney of record for Plaintiff, above named, and that he has examined the records and files in this case herein and states that he executes this affidavit for the reason that certain information relevant to this action can be sworn to only by affiant, and is known by the officers of Plaintiff only upon information and belief.

That on or about the 23rd day of December, 1955, at some time after 11:00 a.m., this honorable Court started proceedings to hear a Motion for Summary Judgment brought by the Defendants herein. That due to the fact that sufficient time was not available, affiant was not heard, except on a few extraneous issues, although Defendants' attorney had completely presented his argument, being first as a moving party. Affiant further states that he was

specifically led to believe that the hearing on the Motion for Summary Judgment was continued to some future time, and affiant states that he specifically asked the Court the time, or date, to which the hearing was continued.

Affiant further states that on the 23rd day of December, 1955, he prepared a statement to Defendants and their attorney, setting forth the amount of the delinquent installment in default and the costs of retaking, keeping and storing the vehicle involved herein, and affiant states that he served a copy of said statement upon Defendants' attorney, Burton Biss, on the 23rd day of December, 1955. Affiant also states that he did prepare said statement in an attempt to conform to the suggestion of this Honorable Court so as to try to get the vehicle back to the Defendants as soon as possible. Affiant states that a copy of the statement is on file herein, having been filed on the 24th day of December, 1955. Affiant further states that despite the statement given to Defendants' attorney, no tender of the amount due as indicated in said statement has ever been made to affiant by either the Defendants or their attorney.

Affiant states upon information and belief, and from the Marshal's Return of Service on file herein, that the vehicle involved herein was taken on the 14th day of December, 1955, and that said vehicle was given into the custody of Plaintiff on the 17th day of December, 1955. Affiant therefore states that if the Marshal's Return of Service is true, that he prepared and served a copy of the statement on

the 6th day after Plaintiffs acquired possession of the vehicle, which is a reasonable time, and well within the ten day period as set forth by the Alaskan Statutes in effect and in particular in accordance with Section 29-2-18 ACLA (1949).

Affiant states that the amount indicated in the aforementioned statement is in the sum of \$214.68 and that no tender in that amount was ever made to affiant; that said sum covers the reasonable costs involved herein, plus the one delinquent installment and that certain of the sums itemized in said statement were not available to affiant until the 23rd day of December, 1955; that Defendant has claimed that certain of the items are unreasonable, in particular the cost of the undertaking in the amount of \$40.00, but affiant states that he prepared an undertaking for private sureties, took said undertaking to the office of the United States Marshal, but said Marshal refused to accept said undertaking and demanded a corporate undertaking and that affiant therefore was forced to obtain a corporate undertaking which cost \$40.00. Affiant further states that since the 3rd day of January, 1956, another installment is now delinquent in default in the amount of \$120.84, which has not yet been paid or tendered.

Affiant further states that the reference to the sum of \$225.00 in the affidavit of Bernard L. Hansen, dated December 20, 1955, was a reference to a check drawn by Defendant, in that amount, which was returned to Plaintiff, not honored by the bank; that affiant sued upon said check in the Commis-

sioner's Court for the Anchorage Precinct, but said suit was dismissed upon a technicality and is now upon appeal in docket No. A-11,713. Affiant further states that he is informed and so believes that said check in the amount of \$225.00 was for part of the down-payment upon the vehicle involved in this action.

Further affiant sayeth not.

/s/ JAMES K. TALLMAN.

Subscribed and sworn to before me this 11th day of January, 1956.

[Seal] /s/ BAILEY E. BELL,
Notary Public in and for Alaska. My Commission
Expires January 28, 1957.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 11, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly for hearing before the Court on the defendant's Motion for Summary Judgment at Anchorage, Alaska, on the 23rd day of December, 1955. The plaintiff appeared by its attorney, James K. Tallman, and was not present personally. The defendant appeared by his attorney, Burton C. Biss, and was not present personally.

It appeared to the Court that the Summons had been duly and regularly issued herein and that the defendant had been regularly served; it further appeared that the defendant had properly served and filed a Motion for Summary Judgment, supported by the Affidavits of the defendant and Blanche Avila; the plaintiff duly served and filed an opposing Affidavit signed by Hallie F. Bollen; defendant further filed a Memorandum of Authority setting forth the basis of his Motion for Summary Judgment; and upon the hearing of the Motion it appearing that there are no material facts the determination of which turns on credibility; and the Court being fully advised in the premises does hereby make and order entered the following, its

Findings of Fact

I.

That on the 31st day of December, 1954, the defendants entered into a Conditional Sales Contract with the plaintiff for the purchase of one 1955 Pontiac automobile bearing Motor number K755H82118, and Serial number K755H82118.

II.

That the defendants defaulted in the payment of an installment due on the 3rd day of December, 1955.

III.

That plaintiff re-possessed the automobile, and is still retaining it in its possession.

IV.

That plaintiff failed to furnish defendants a written statement of the amount due under the Conditional Sales Contract and the expenses of re-taking and keeping and storing the car, but defendants duly tendered to plaintiff a sum equal to or exceeding the amount due under the contract and the expenses of re-taking, keeping and storing the automobile, which tender was refused.

V.

That at the time plaintiff refused to accept defendant's tender, defendant had already paid the sum of Two Thousand Four Hundred Twenty Nine Dollars and Forty Cents (\$2,429.40) in payments under the contract, with interest.

And from the foregoing Findings of Fact, the Court does hereby make and deduce the following:

Conclusions of Law**I.**

The defendants are entitled to the possession of the automobile.

II.

The defendants are entitled to continue in the performance of the contract as if no default had occurred.

III.

That the plaintiff failed to furnish to the defendants an accurate written statement of the sum due under the contract and the expense of re-taking, keeping and storage.

IV.

That the defendants tendered the amount due under the contract at the time of re-taking, and further tendered a sum sufficient to cover the expenses of re-taking, keeping and storage.

V.

That the plaintiff failed to accept the tender of the defendants, and failed to re-deliver the automobile to defendants, and failed to allow defendants to continue in the performance of the contract as if no default had occurred.

VI.

That defendants are entitled to the Decree of this Court awarding to them damages in the amount of One-Fourth of the sum paid in on the contract, namely, damages in the amount of Six Hundred Seven Dollars and Thirty Five Cents (\$607.35), plus attorney's fees in the amount of \$1.00.

Done by the Court and ordered entered at Anchorage, Alaska, this 26th day of January, 1956.

/s/ J. L. McCARREY, JR.,
District Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 11, 1956.

In the District Court for the District of Alaska,
Third Division

No. A-11,693

NEW AND USED AUTO SALES, INC.,
A Corporation, Plaintiff,

vs.

BERNARD L. HANSEN, a/k/a BARNEY HANSEN, and SUZANNE HANSEN, Defendants.

JUDGMENT

This matter coming on regularly for hearing before the Court on the defendant's Motion for Summary Judgment at Anchorage, Alaska, on the 23rd day of December, 1955, the plaintiff not being present in person and being represented by its attorney of record, James Tallman, and the defendant not being present in person and being represented by his attorney of record, Burton C. Biss, and it appearing to the Court that Summons had been duly and regularly issued herein and that the defendants had been personally served, and upon the hearing of said Motion, the defendants having duly served and filed affidavits in support of their Motion for Summary Judgment, from which it appears that there are no facts the determination of which turns on credibility, and that all of the material facts in support of the Motion are true; and the Court being fully advised in the premises and having entered herein its Findings of Fact and Conclusions of Law, it is

Ordered, Adjudged and Decreed that the defendants be, and they hereby are, granted Judgment against the plaintiffs in the amount of Six Hundred Seven Dollars and Thirty Five Cents (\$607.35), and an attorney's fee in the amount of One Dollar (\$1.00).

Done by the Court and ordered entered at Anchorage, Alaska, this 26th day of January, 1956, at the hour of 4:10 p.m.

/s/ J. L. McCARREY, JR.,
District Judge.

Entered Journal No. G-44, page 110, Jan. 26, 1956.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 26, 1956.

[Title of District Court and Cause.]

HEARING ON FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time, cause No. A-11,693, entitled New and Used Auto Sales, Inc., a Corporation, plaintiff, versus Bernard L. Hansen, a/k/a Barney Hansen, and Suzanne Hansen, defendants, came on regularly for Hearing on Findings of Fact and Conclusions of Law and Judgment; plaintiff represented

by James K. Tallman, of counsel; defendant represented by Burton C. Biss, of counsel.

Argument to the Court was had by James K. Tallman, for and in behalf of the plaintiff.

Argument to the Court was had by Burton C. Biss, for and in behalf of the defendants.

Argument to the Court was had by James K. Tallman, for and in behalf of the plaintiff.

Whereupon, Court having heard the arguments of respective counsel and being fully and duly advised in the premises; directs the plaintiff to return subject car to defendant and to pay to defendant $\frac{1}{4}$ amount of monies paid on contract by defendant.

Entered Journal No. G44, Page No. 133, January 31, 1956.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND TO SET ASIDE JUDGMENT AND TO STRIKE

Plaintiff moves for new trial in the above entitled action and further moves to set aside the judgment entered herein and to strike from the files and records the motion for summary judgment and the affidavits filed in support thereof for the reason that there is no law authorizing and no applicable rule of the Federal Rules of Civil Procedure that authorizes any such an act and the motion and all supporting affidavits should be

stricken and the judgment based thereon vacated and set aside. Plaintiff offers as further reasons in support of the above motion the following:

1. That the judgment does not dispose of all material issues in the case herein.
2. That the Findings of Fact upon which said judgment is based are not supported by the evidence, and in particular that paragraph four of the Findings of Fact is in conflict with the record herein in that the original of a written statement is on file herein upon which a receipt of a copy has been acknowledged by the Defendants' attorney; and the evidence further shows said statement was furnished defendants six days after the vehicle was actually acquired by plaintiff.
3. That the proceedings herein were irregular in that a motion for summary judgment was not the proper remedy for defendant since several issues of material fact were involved herein and that said issues of material fact were in dispute.
4. That the proceedings were irregular herein for the reason that the decision was rendered in this case before Plaintiff had been given an opportunity of argument and presentation of evidence, although defendant had fully presented oral argument and evidence in the form of affidavits; that said statement is supported by a letter from the Clerk of the District Court, dated January 10th, 1956, advising that motion for summary judgment had been granted.
5. That the action of the defendants was brought prematurely in that said motion for summary judg-

ment was filed and set to be heard before the expiration of the ten day period during which the seller shall retain the goods after retaking in accordance with Section 29-2-18 (ACLA 1949).

6. That the defendant has suffered no actual damages, except through his own refusal to pay the sum in the statement given to defendants on the 23rd day of December, 1955, and also given to the defendants six days after plaintiff got possession of the vehicle.

This motion is based upon the pleadings, papers and records on file herein.

Dated this 1st day of February, 1956.

BELL, SANDERS & TALLMAN,
/s/ By JAMES K. TALLMAN
Of Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed February 2, 1956.

[Title of District Court and Cause.]

HEARING ON MOTION FOR NEW TRIAL

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time Hearing on Motion for New Trial in cause No. A-11,693, entitled New & Used Auto Sales, Inc., a corporation, plaintiff, versus

Bernard L. Hansen, a/k/a Barney Hansen, and Suzanne Hansen, defendants, came on regularly before the Court, plaintiff represented by James K. Tallman, of counsel, defendant represented by Burton C. Biss, of counsel, the following proceedings were had, to-wit:

Argument to the Court was had by James K. Tallman, for and in behalf of the plaintiff.

At 3:05 o'clock p.m. Court continued cause to 3:15 o'clock p.m.

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now came the respective counsel as heretofore and the Hearing on Motion for New Trial in cause No. A-11,693, entitled New & Used Auto Sales, Inc., a corporation, plaintiff, versus Bernard L. Hansen, a/k/a Barney Hansen, and Suzanne Hansen, defendants, was resumed.

Argument to the Court was had by Burton C. Biss, for and in behalf of the defendants.

Whereupon, Court having heard the arguments of respective counsel and being fully and duly advised in the premises, now denies motion for a New Trial and Motion to set aside Judgment and to Strike, and directs plaintiff to return the subject Motor Vehicle to the defendant, forthwith, and fixes attorney's fees at \$50.00, and directs counsel for defendant, to prepare written order accordingly.

Entered Journal No. G44, Pages No. 168-9, February 3, 1956.

[Title of District Court and Cause.]

ORDER

This matter came before the Court on February 3, 1956, on the Motion of plaintiff for a new trial and to set aside judgment and to strike; the plaintiff being represented by its attorney of record, James Tallman and the defendants being represented by their attorney of record, Burton C. Biss, and argument being made to the Court, and it appearing to the Court that the Motion was not well taken, and the Court being fully advised in the premises it is

Ordered that the plaintiff's motion for a new trial and to set aside the judgment and to strike be, and the same hereby is, denied; that plaintiff return the automobile which is the subject matter of this action to the defendants forthwith; that the plaintiff pay to the defendants the sum of Fifty Dollars (\$50.00) for attorney's fees herein.

Done by the Court and ordered entered at Anchorage, Alaska this 3rd day of February, 1956, at the hour of 4:15 P.M.

/s/ **J. L. McCARREY, Jr.**
District Judge.

Entered Journal No. G44, Page No. 169, Feb. 3, 1956.

Acknowledgment of Service Attached.

[Endorsed]: Filed February 3, 1956.

[Title of District Court and Cause.]

NOTICE

To Bernard L. Hansen, a/k/a Barney Hansen, and Suzanne Hansen, and their attorney, Burton Biss;

Please take notice that the above named Plaintiff, New and Used Auto Sales, Inc., a Corporation, herewith tenders to you the possession of one 1955, Pontiac automobile bearing Motor No. K755H82118, Serial No. K755H82118, which said automobile is the subject of litigation herein, upon the following conditions:

1. That you pay up all delinquent installments to date, consisting of an installment of \$120.84 due the 3rd day of December, 1955, an installment of \$120.84 due the 3rd day of January, 1956, and an installment of \$120.84 due the 3rd day of February, 1956.
2. That you pay the cost of retaking, keeping, and storage of said vehicle in the sum of \$93.84, which said costs are itemized in that certain statement served upon you on the 23 day of December 1955, and filed herein on the 24th day of December, 1955.
3. That you continue to make payments under the conditional sale contract entered into on the 31st day of December, 1954, between you and New & Used Auto Sales, Inc., as if no default had occurred.

Your are further notified the above offer shall not be construed as depriving Plaintiff of its right to appeal from the judgment against Plaintiff herein.

NEW & USED AUTO SALES, INC.,
Plaintiff,
BELL, SANDERS & TALLMAN,
/s/ By: BAILEY E. BELL,
Plaintiff's Attorney

[Endorsed]: Filed February 6, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

James K. Tallman, being first duly sworn, deposes and states:

That he served a copy of the attached notice upon the secretary of Burton Biss, at the law office of Burton Biss in the Central Building, Anchorage, Alaska, at the hour of 9:15 A.M. on the 6th day of February, 1956.

/s/ JAMES K. TALLMAN

Subscribed and Sworn to before me this 6th day of February, 1956.

[Seal] WILLIAM H. SANDERS
Notary Public in and for Alaska. My Commission
Expires: May 22, 1958.

[Endorsed]: Filed February 6, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that New & Used Auto Sales, Incorporated, a corporation, Plaintiff, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 26th day of January, 1956.

BELL, SANDERS & TALLMAN

/s/ By BAILEY E. BELL,
Attorneys for Appellant

[Endorsed]: Filed February 6, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

James K. Tallman, being first duly sworn, deposes and states:

That he served a copy of the attached notice of appeal upon the secretary of Burton Biss, at the law office of Burton Biss in the Central Building, Anchorage, Alaska, at the hour of 9:15 A.M. on the 6th day of February, 1956.

/s/ JAMES K. TALLMAN

Subscribed and Sworn to before me this 6th day of February, 1956.

[Seal] /s/ WILLIAM H. SANDERS,
Notary Public in and for Alaska. My Commission
Expires: May 22, 1958.

[Endorsed]: Filed February 6, 1956.

[Title of District Court and Cause.]

HEARING ON MOTION TO FIX SUPER- SEDEAS BOND

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time Hearing on Motion to Fix Supersedeas Bond in cause No. A-11,693, entitled New and Used Auto Sales, Inc., a corporation, plaintiff, versus Bernard L. Hansen, a/k/a Barney Hansen and Suzanne Hansen, defendants came on regularly before the Court, plaintiff represented by Bailey E. Bell and James K. Tallman, of counsel, defendant represented by Burton C. Biss, of counsel, the following proceedings were had, to-wit:

Argument to the Court was had by James K. Tallman, for and in behalf of the plaintiff.

Argument to the Court was had by Burton C. Biss, for and in behalf of the defendant.

Argument to the Court was had by James K. Tallman, for and in behalf of the plaintiff.

Whereupon, Court having heard the arguments of respective counsel and being fully and duly advised in the premises, fixes supersedeas bond at \$4,000.00.

Entered Journal No. G44, Page No. 206, Feb. 8, 1956.

[Title of District Court and Cause.]

HEARING ON JUSTIFICATION OF BONDSMEN

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

Now at this time Hearing on Justification of Bondsmen in cause No. A-11,693, entitled New & Used Auto Sales, Inc., a corporation, plaintiff, versus Bernard L. Hansen, a/k/a Barney Hansen, and Suzanne Hansen, defendants came on regularly before the Court, plaintiff represented by James K. Tallman, of counsel, defendant represented by Burton C. Biss, of counsel, the following proceedings were had, to-wit:

Hallie F. Bollen, being first duly sworn, testified for and in behalf of the plaintiff.

Florence N. Bollen, being first duly sworn, testified for and in behalf of the plaintiff.

A balance sheet, dated November 30, 1955, of New and Used Auto Sales, Inc., was duly offered, marked and admitted as Plaintiff's Exhibit 1.

Whereupon, Court having heard the testimony,

and being fully and duly advised in the premises, finds bondsmen qualified, providing they sign bond as a corporation and as individuals.

Entered Journal No. G44, Page No. 245, Feb. 16, 1956.

[Title of District Court and Cause.]

DESIGNATION OF POINTS

Appellant, New and Used Auto Sales, Inc., a corporation, hereby designates the following as points upon which appellant intends to rely:

- (1) That the Lower Court erred in basing it's judgment herein upon a material question of fact which is in dispute.
- (2) That the Lower Court erred in making findings of fact that are contrary to the record.
- (3) That the Lower Court erred in making findings of fact based solely upon the affidavits of defendants.
- (4) That several genuine issues of material fact are in dispute and have never been admitted by Appellant, but on the contrary, said issues have been denied by Appellant and evidence offered.
- (5) That the motion for summary judgment was set for hearing three days after the filing and serving of said motion, contrary to Rule 56 (c) of the Federal Rules of Civil Procedure, and the Lower Court erred in hearing said motion three days after service upon Appellant.
- (6) That the Lower Court erred in rendering a

decision on the motion for summary judgment before counsel for Plaintiff had presented argument.

(7) That the motion for summary judgment was not properly before the court since the motion for summary judgment was not responsive to the allegations of the complaint.

(8) That the Lower Court erred in refusing to give effect to an acceleration clause in the conditional sales contract, and holding that acceleration clauses are invalid.

BELL, SANDERS & TALLMAN
/s/ JAMES K. TALLMAN,
Attorneys for Appellant

Acknowledgment of Service Attached.

[Endorsed]: Filed March 5, 1956.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDING

Before: The Honorable J. L. McCarrey, Jr., U.S. District Judge.

Anchorage, Alaska, December 23, 1955, 11:30 o'clock a.m. * * * * *

Mr. Tallman: Yes, your Honor, that is correct. I will check this matter before we resume this hearing.

The Court: Well, excepting this: if by chance you want to take into consideration the position of the Court at this time as to damages, I think you better do it today.

Mr. Tallman: That's what I mean, your Honor. This will be resumed at 1:30.

The Court: Oh, no, the Court—this is the last case for the day.

Mr. Biss: If the Court please, there is one other small problem; that is, what are the expenses of retaking possession and so forth? As is set forth under the statute, he's required to pay the reasonable amounts. We have tendered first, what we felt to be the reasonable amount, and then we tendered a sum that we claimed reasonable, or unreasonable, including \$40.00 for repossession bond and everything else, so that probably, if there is any minor question to be answered, it will be what are the reasonable expenses.

The Court: Well, but then the Court wants to take that into consideration. We don't have time. The Court's indicated that he wants to adjourn and is going to adjourn. I just call your attention, out of fairness to you, Mr. Tallman, for your client, that if by chance you are in error and refuse to let the defendant have his car back over the holidays, that is a point to be considered by the Court, and will be considered by the Court. I would also point out to both counsel that the question of what is to be reasonable—under the circumstances I would not want to indicate at this time, but I think that you should on behalf of the Defendant, Mr. Biss, tender to them what they do claim as set forth, excepting for the acceleration and then this other matter can be determined at a later date. The Court will stand in recess until call of the gavel.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Wm. A. Hilton, Clerk of the above entitled court, do hereby certify that pursuant to the provisions of Rule 10 (1) of the United States Court of Appeals, Ninth Circuit, of Rules 75 (g) (o) of the Federal Rules of Civil Procedure, and of the designations of counsel for the respective parties, I am transmitting herewith the Original Papers in my office dealing with the above entitled action or proceeding, except the court reporter's transcript of the arguments of counsel, which transcript is to follow.

The papers herewith transmitted constitute the record on appeal, from the judgment filed and entered in the above entitled action by the above entitled court on January 26, 1956, to the United States Court of Appeals, Ninth Circuit, San Francisco, California.

Dated at Anchorage, Alaska, this 20th day of April, 1956.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Endorsed]: No. 15,117. United States Court of Appeals for the Ninth Circuit. New and Used Auto Sales, Inc., a corporation, Appellant, vs. Bernard L. Hansen, also known as Barney Hansen and Suzanne Hansen, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: April 30, 1956.

/s/ PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,117

NEW & USED AUTO SALES, INC.,

a corporation,

Appellant.

vs.

BERNARD HANSEN, also known as BARNEY
HANSEN, and SUZANNE HANSEN,
Appellees.

STATEMENT OF POINTS

Comes now the Appellant, New & Used Auto Sales, Inc., a corporation, and adopts as Appellant's statement of points for the purposes of this appeal, pursuant to Rule 17, Sub-section Six (6), of the Rules of Practice before the United States Court of Appeals for the Ninth Circuit, the heretofore filed designation of points, which said designation consists of eight (8) points.

Dated at Anchorage, Alaska, this 26th day of May, 1956.

BELL, SANDERS & TALLMAN
/s/ By JAMES K. TALLMAN,
Attorneys for Appellant

[Endorsed]: Filed May 29, 1956. Paul P.
O'Brien, Clerk.